IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-6101

THE CITY OF HIGHLAND PARK, ILLINOIS, ETC., ET AL.,
*Petitioners,*

*vs.*

RUSSELL E. TRAIN, ETC., ET AL.,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Petitioners, The City of Highland Park, Illinois, The Village of Deerfield, Illinois, Tri-Suburban Defense Council, Franklin Cole, Joan Cole, Lesley Kodner, Denise Kodner, James Frankel, Florence Frankel, Andrew Taft, Katherine Taft, Thomas Nathan, Louise Nathan, Ralph L. Brill, Judith Brill, Ludoslaw Tybur, Kay Tybur, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 24, 1975.

## OPINIONS BELOW.

The modified opinion of the Court of Appeals for the Seventh Circuit entered July 24, 1975 (A10) is reported at 519 F. 2d 681 (7th Cir. 1975). The court's original opinion, entered

June 10, 1975 (A45), is unreported. The opinion of the United States District Court for the Northern District of Illinois, Eastern Division (A71), dismissing the action is reported at 374 F. Supp. 758 (N. D. Ill. 1974).

## JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 10, 1975 (A43). A timely petition for rehearing and suggestion for en banc hearing was denied and the Court modified its previous opinion on July 24, 1975 (A39). This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

## QUESTIONS PRESENTED.

1. Whether § 304 of the Clean Air Act, 42 U. S. C. § 1857h-2, is the exclusive basis of district court subject matter jurisdiction to remedy the Environmental Protection Agency Administrator's failure to perform a statutorily mandated duty under the Clean Air Act, 42 U. S. C. § 1857 *et seq.*?

2. Whether the 60 day notice prerequisite for actions under § 304 is a bar to subject matter jurisdiction in actions brought under the general federal question statute (28 U. S. C. § 1331); the statute creating subject matter jurisdiction to compel an officer of the United States to perform his duty (28 U. S. C. § 1361); and the Administrative Procedure Act (5 U. S. C. §§ 701-706) where § 304(e) specifically preserves preexisting statutory and common law causes of action?

3. Whether the Administrator's failure to include statutorily mandated elements in his promulgation of a regulation under the Clean Air Act renders such failure reviewable in the district court (under either 42 U. S. C. § 1857h-2, 28 U. S. C. § 1331, 28 U. S. C. § 1361, 5 U. S. C. §§ 701-706) or in the Court of Appeals (under 42 U. S. C. § 1857h-5(b)(1)) or both?



## STATUTES INVOLVED.

This case involves the jurisdictional grants for judicial review under the Clean Air Act of 1970—Section 304, 42 U. S. C. § 1857h-2 (A4) and Section 307, 42 U. S. C. § 1857h-5 (A7) —and subject matter jurisdiction under 28 U. S. C. § 1331 (A4), 28 U. S. C. § 1361 (A4) and the provisions of the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.* (A1).

## STATEMENT OF THE CASE.

The controversy presented to this Court involves the "jurisdictional badminton" played by the United States Environmental Protection Agency, the Circuit Courts of Appeal and the district courts in applying the jurisdictional grants created by the Clean Air Act, 42 U. S. C. § 1857 *et seq.* and the preexisting jurisdictional grants under 28 U. S. C. § 1331, 28 U. S. C. § 1361 and 5 U. S. C. §701 *et seq.* Instead of administering a system for judicial review designed to give swift and clear adjudication of substantive rights and obligations under the statute, the lower courts have become bogged down in a series of jurisdictional inconsistencies. These inconsistencies have hamstrung the Congressional desire to achieve air quality on an expeditious schedule and have left persons injured by EPA actions or failures to act asking the jurisdictional analog to the Abbott and Costello refrain—"Who's on first?"

Though there are a number of variations, the basic problem stems from promulgation of regulations by the Administrator in which the Administrator fails to include statutorily mandated components. Under § 307 of the Clean Air Act, 42 U. S. C. § 1857h-5(b)(1), judicial review of promulgated regulations is directly in the United States Court of Appeals for the "appropriate circuit". Under § 304 of the Clean Air Act, 42 U. S. C. § 1857h-2(a), the Administrator's failure to perform a nondiscretionary duty can be reviewed by an action against the Administrator in the district court.

Since a promulgation of regulations which fails to include statutorily mandated components necessarily involves both promulgation and failure to act, the courts have demonstrated a schizophrenic reaction to attempts to seek judicial review either in the district court or the court of appeals. Indeed, the Circuit Court of Appeals for the District of Columbia has suggested that the Administrator's failure to include statutorily required components in the regulations he promulgates may be reviewable either in the district court (§ 304) or the court of appeals (§ 307). See *Natural Resources Defense Council* v. *Environmental Protection Agency*, 512 F. 2d 1351, 1356-1357 (D. C. Cir. 1975). At least one other circuit has held that once a regulation is promulgated, all challenges, including failures to include certain components, should be heard by the appellate court. *Anaconda* v. *Ruckelshaus*, 482 F. 2d 1301, 1304 (10th Cir. 1973). The Seventh Circuit in the decision below held that despite the Administrator's promulgation of what purported to be regulations governing significant deterioration (39 Fed. Reg. 42510, December 5, 1974) and despite the Administrator's claim that the sole method of judicial review for deficiencies in those regulations was in the court of appeals, the exclusive avenue of review was in the district court. *City of Highland Park* v. *Train*, 519 F. 2d 681, 697 (7th Cir. 1975)[1] (A37).

This confusion over jurisdiction between district court and appellate court has been compounded by the inconsistent positions taken by the Administrator in jurisdictional disputes in Clean Air Act cases and almost identical jurisdictional disputes

1. Ironically, the district judge who first ordered the Administrator to promulgate significant deterioration regulations has held that the promulgation of even partial significant deterioration regulations vests jurisdiction exclusively in the court of appeals. Order of Judge John H. Pratt, November 15, 1974, in *Sierra Club* v. *Train*, ..... F. Supp. ..... (D. D. C. C. A. No. 1031-72). It was Judge Pratt who originally entered the order requiring promulgation of significant deterioration regulations. *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253 (D. D. C. 1972); *aff'd. per curiam* ..... F. 2d ....., 4 E. R. C. 1815 (D. C. Cir. 1972), *aff'd. by an equally divided Court sub nom. in Fri* v. *Sierra Club*, 412 U. S. 541 (1973).



under the similar judicial review provisions of the Federal Water Pollution Control Act Amendments of 1972.[2] In some cases the Administrator has argued that omissions or failures to include statutorily required components in regulations should be brought in the district court[3] and in other cases the Administrator has argued that such omissions must be challenged exclusively in the appellate court.[4]

This "jurisdictional badminton"[5] game reached its zenith in the instant case. Petitioners brought suit in the district court against the Administrator and a group of shopping center developers seekings a mandatory injunction requiring the Administrator to promulgate "complex source" regulations and significant deterioration regulations relating to complex sources. "Complex" or "indirect source" are terms used to describe facilities which don't emit pollutants themselves but which attract significant vehicle congestion and thus cause significant vehicular pollution. The Administrator has repeatedly stated that such sources are significant health hazards and that preconstruction permit review is the only rational method of changing traffic design or location to avoid traffic congestion. Petitioners sought a preliminary injunction against the developers asking that construction be halted until the regulations had been applied to the proposed center. Promulgation of the regulations was long overdue under the statutory timetable mandated by the Clean Air Act.

Jurisdiction in the district court was predicated on 28 U. S. C. § 1331, 28 U. S. C. § 1361, § 304 of the Clean Air Act, and

2. § 505 (district court, 33 U. S. C. § 1365) and § 509 (appellate court 33 U. S. C. § 1369).

3. *N. R. D. C.* v. *E. P. A.*, 512 F. 2d 1351, 1357 (D. C. Cir. 1975).

4. Brief of Federal appellees in the Seventh Circuit in the instant case, *City of Highland Park* v. *Train*, at p. 12: See also *Natural Resources Defense Council* v. *Train*, 519 F. 2d 287, 290 (D. C. Cir. 1975).

5. See the dissenting opinion of Judge Wright in *N. R. D. C.* v. *E. P. A.*, 512 F. 2d 1351 at 1361 (D. C. Cir. 1975).

the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.* Since construction of the shopping center was imminent and because preliminary injunctive relief was sought under Rule 65, Federal Rules of Civil Procedure, petitioners did not file a 60 day notice as required by § 304(b). Instead, they relied on the traditional bases for district court jurisdiction alleged in their complaint.

While the district court litigation was pending, the Administrator promulgated what purported to be "indirect source" regulations. 39 Fed. Reg. 7270 (February 25, 1974). However, he expressly excluded from the scope of his indirect source regulations the significant deterioration aspects of indirect source control.

> "Because several basic approaches are still being considered, an attempt to reflect non-deterioration considerations in the indirect source regulations would be premature. However it is EPA's intent that indirect source and significant deterioration regulations will be consistent with one another. *Specific relationships will be addressed in regulation to be promulgated on significant deterioration.*"
>
> 39 Fed. Reg. at 7271 (emphasis added).

Despite a claim by the Administrator that § 304 was the exclusive basis of district court jurisdiction and that the action was therefore barred by failure to give 60 days notice, the district court held that the 60 day notice provision did not bar jurisdiction under 28 U. S. C. §§ 1331 and 1361. However, the district court ruled for the Administrator on the merits, concluding that the Administrator had complied with his statutory duty by promulgating the February 25, 1974 indirect source regulations.

As to the failure of the Administrator to include significant deterioration aspects of indirect source regulations, the district court concluded that the significant deterioration issue was discretionary with the Administrator.[6] He therefore dismissed the complaint for failure to state a claim.



Petitioners appealed and during the pendency of the appeal the Administrator promulgated what purported to be significant deterioration regulations. 39 Fed. Reg. 42510 (December 5, 1974). However, contrary to his earlier promise to include indirect source controls in his significant deterioration regulations, no mention was made concerning indirect sources. Yet the Administrator's brief in the Seventh Circuit below argued that the December 5, 1974 regulations had complied fully with the court's order in *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253 (D. D. C. 1972), *aff'd. per curiam*, 4 E. R. C. 1815 (D. C. Cir. 1972); *aff'd. by an equally divided Court sub nom. Fri* v. *Sierra Club*, 412 U. S. 541 (1973). The Administrator contended that any dissatisfaction with those regulations should be reviewed exclusively in the court of appeals under § 307.

Petitioners attempted to preserve the merits of their claim from these jurisdictional anomalies by maintaining both the district court appeal[7] and by filing a timely petition for review directly in the court of appeals under § 307.[8] On petitioners' motion, the two proceedings were consolidated.

In direct contrast to the district court below the Seventh Circuit held that the Administrator had not complied with the mandate of the *Sierra Club* decision but that the petitioners

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6. "Moreover, it has not been conclusively determined that the Clean Air Act requires the prevention of significant deterioration as a decision by an equally divided Supreme Court is not an authoritative determination for other cases." 374 F. Supp. 758 at 774 (A97), referring to this Court's action in *Fri* v. *Sierra Club*, 412 U. S. 541 (1973).

7. In the Seventh Circuit, the district court appeal was designated No. 74-1271.

8 In the Seventh Circuit, the petition for review of the Administrator's failure to include significant deterioration controls for carbon monoxide, hydrocarbons, oxides of nitrogen and photochemical oxidants—the vehicular pollutants associated with indirect sources—in his promulgation on December 5, 1974, 39 Fed. Reg. 42510, was designated No. 75-1006.

had failed to meet the jurisdictional prerequisites to raise the substantive issue. The court of appeals held that the Administrator's failure to include statutorily mandated components in the promulgated regulations should be reviewed exclusively in the district court. Moreover, the Seventh Circuit held that the exclusive basis for district court subject matter jurisdiction was § 304(a)(2). It held that district court jurisdictional bases which would have existed apart from § 304—28 U. S. C. § 1331, 28 U. S. C. § 1361 and the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.*—had been barred by the enactment of § 304. The Seventh Circuit's decision that § 304 was the exclusive basis of district court subject matter jurisdiction was made despite the express savings provision of § 304(e), 42 U. S. C. § 1857h-2(e) which states:

> "(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator of a State agency)."

Since the Seventh Circuit held that § 304 is the exclusive basis of district court jurisdiction and since petitioners had not given the sixty day notice required by § 304(b)(1)(A) as a prerequisite to an action under § 304, the court of appeals held that there was no subject matter jurisdiction in the district court.

Moreover, despite a petition for rehearing which cited both the directly contrary opinion of the District of Columbia Circuit in *Natural Resources Defense Council* v. *Train*, 510 F. 2d 692, 698-703 (D. C. Cir. 1975)[9] and the decision of this Court in *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1967) and *Rusk* v. *Cort*, 369 U. S. 367 (1962), the Seventh Circuit declined to change its decision. It simply filed a modified opinion acknowledging the conflict between the Seventh Circuit and the District of Columbia Circuit.

9. See also *Natural Resources Defense Council* v. *Train*, 519 F. 2d 287, 291 (D. C. Cir. 1975); *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654, 664 n. 16 (D. C. Cir. 1975).



The Seventh Circuit's decision on the exclusivity of § 304 as a basis of district court jurisdiction raises a three-pronged dilemma in cases where the Administrator fails to include certain components in promulgating regulations:

1. Requirement of a 60 day notice prior to commencing an action effectively precludes a person suffering injury as a result of the Administrator's failure to act from seeking temporary or preliminary injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure. As explained in *N. R. D. C.* v. *Train*, 510 F. 2d 692, 700 (D. C. Cir. 1975) the purpose of § 304 was to *expand* jurisdiction to those lacking the requisite injury for standing and jurisdictional amount. It was not designed to bar emergency relief for those actually suffering injury who would have had the requisite standing to seek relief under other jurisdictional grants.

2. Exclusivity of § 304 jurisdiction would render unreviewable those failures to act which are not a violation of a clear duty but are an abuse of discretion normally reviewable under 5 U. S. C. § 706(2)(A). Cf. *N. R. D. C.* v. *Train*, 519 F. 2d 287, 291 (D. C. Cir. 1975). Both the district court and the court of appeals below questioned whether the duty to promulgate significant deterioration regulations was non-discretionary or actually within the discretion of the Administrator.[10] If the duty to promulgate is discretionary then § 304 jurisdiction does not exist and review of the Administrator's failure to promulgate such regulations is in a "jurisdictional limbo" *N. R. D. C.* v. *Train*, 519 F. 2d 287 at 291.

3. Congress clearly intended § 304 to expand the jurisdiction of district courts to persons who would otherwise not have the requisite standing to sue. Congress wanted uninjured citizens to act as "private attorneys general" to aid in the enforcement of the Clean Air Act.[11] As a limitation on this new expansion

10. *City of Highland Park* v. *Train*, 519 F. 2d at 692 (A27); district court opinion 374 F. Supp. at 774 (A97).

11. Compare the lack of a standing requirement under § 304 with the required standing to seek appellate review under § 307,

of jurisdiction to non-injured private attorneys general, Congress imposed a 60 day notice provision. However, Congress expressly stated that § 304 was not intended to affect or restrict the jurisdiction and remedies which existed under other statutes and at common law. But the Court of Appeal's decision below destroys those traditional statutory bases of judicial relief for persons suffering actual injury.

## REASONS FOR GRANTING THE WRIT.

### 1. The Decision Below Conflicts with Decisions of the Supreme Court as to the Exclusivity of a Statutory Jurisdictional Grant and the Preclusion of Traditional Bases of Subject Matter Jurisdiction.

The district court action below was brought under four separate bases of subject matter jurisdiction:

a. 28 U. S. C. § 1331—general federal questions
b. 28 U. S. C. § 1361—action to compel a federal officer to perform a duty owed to plaintiff
c. 5 U. S. C. § 701 *et seq.*—the Administrative Procedure Act
d. 42 U. S. C. § 1857h-2—citizen suits under the Clean Air Act

The Seventh Circuit held that § 1857h-2 is the exclusive jurisdictional basis for district court claims against the Administrator. Since petitioners, in seeking preliminary injunctive relief, had not filed the 60 day notice required by § 1857h-2(b)(1)(A), the Seventh Circuit held that no suit could be commenced even though the action was also brought under jurisdictional grants provided by other statutes.

Unfortunately the Seventh Circuit completely ignored the existence of the explicit statutory language which preserves other

*Natural Resources Defense Council* v. *E. P. A.*, 481 F. 2d 116, 119-120 (10th Cir. 1973).



statutory and common law remedies wholly independent of § 304.

Section 304(e) expressly provides:

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."
>
> 42 U. S. C. § 1857h-2(e) (A6).

The explicit congressional intent set forth in § 1857h-2(e) not to restrict traditional remedies is echoed throughout the legislative history of the Clean Air Act. For example, the House-Senate Conference Committee stated:

> "The right of persons or classes of persons to seek enforcement or relief under any other statute or common law remedy is not affected."[12]

The Senate Public Works Committee expressed similar intent:

> "It should be noted however that the section [1857h-2] would preserve any rights or remedies under any other law."[13]

The 60 day notice requirement was intended only as a limitation to the special actions under § 1857h-2 and was not intended to restrict jurisdiction over actions that could exist independent of § 1857h-2. See: *Natural Resources Defense Council* v. *Train*, 510 F. 2d 692, 698-703 (D. C. Cir. 1975).[14] Indeed, the pur-

12. See: A Legislative History of the Clean Air Act Amendments of 1970, prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (1974) p. 206.

13. *Id.* at 438.

14. This decision by the Court of Appeals for the District of Columbia contains an extended analysis of the legislative history of § 1857h-2 and its analog under the Federal Water Pollution Control Act, 33 U. S. C. § 1365(b)(2). See: pp. 698-702. The holding of that case is directly contrary to the Seventh Circuit's decision for which petitioners seek certiorari.

pose of § 1857h-2 was to expand federal subject matter jurisdiction by removing obstacles of jurisdictional amount and standing which barred actions by citizens not suffering "injury in fact". This special citizen suits provision was definitely not intended to limit those actions where traditional jurisdictional amount and standing requirements had been met.[15] See: *N. R. D. C.* v. *Train, supra*, 510 F. 2d at 700.

The clear statutory language of the savings clause, § 1857h-2(e), and the multiple expressions of legislative intent not to restrict independent remedies becomes even more significant when viewed in light of this Court's decisions analyzing government claims of exclusivity of review under specialized statutes. The leading decision is *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1967).

In *Abbott*, a group of drug manufacturers brought suit in district court challenging a labeling regulation promulgated by

15. That subject matter jurisdiction exists under other statutes to review the Administrator's failure to act is clear. Where the district court must examine the federal substantive law upon which a claim for relief is founded, the district court has subject matter jurisdiction under 28 U. S. C. § 1331, general federal question jurisdiction. *The Fair* v. *Kohler Die Company*, 228 U. S. 22, 25 (1913); *Bell* v. *Hood*, 327 U. S. 678, 682 (1946); *Wheeldin* v. *Wheeler*, 373 U. S. 647, 649 (1963); *Montana-Dakota Co.* v. *Pub. Serv. Co.*, 341 U. S. 246, 249 (1951); *Powell* v. *McCormack*, 395 U. S. 486, 516 (1969); *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 409 F. 2d 718, 719-720 (2nd Cir. 1969), *rev'd. on merits*, 403 U. S. 388 (971). The complaint alleges and no one has disputed that the amount in controversy exceeds $10,000. See: *St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U. S. 283 (1938).

While not essential to subject matter jurisdiction (given jurisdiction under § 1331), this Court has indicated and the Circuit Courts of Appeals have increasingly held, that the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.* provides an independent basis of subject matter jurisdiction. See: *Pickus* v. *United States Board of Parole*, 507 F. 2d 1107, 1109 (D. C. Cir. 1974) and cases cited therein. There is no need to engage in extended discussion on the Seventh Circuit's narrow construction of 28 U. S. C. § 1361 jurisdiction other than to note that the rigid mandamus construction of § 1361 is contrary to the broad remedial purpose of the statute. See: *Peoples* v. *United States Department of Agriculture*, 427 F. 2d 561 (D. C. Cir. 1970).



the Commissioner of the Food and Drug Administration. The district court dismissed the complaint on the ground that 21 U. S. C. §§ 371(e) and (f), which provided for review of certain kinds of regulations in the Court of Appeals, was the exclusive review mechanism. This Court reversed, stating:

> "Judicial review of a final agency action will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."
>
> 387 U. S. at 140.

This Court found no evidence at all that Congress intended to preclude traditional avenues of judicial review. Indeed, in an analysis particularly appropriate to the instant case, this Court emphasized the existence of a savings clause provision in the review statutes which, like § 1857h-2(e), preserved existing remedies. 387 U. S. at 144. The Court found the savings clause to be affirmative evidence of congressional intent to preserve remedies such as those existing under the Administrative Procedure Act:

> "We prefer to take the savings clause at face value and to read it in harmony with the policy favoring judicial review expressed in the Administrative Procedure Act and this Court's decisions."
>
> 387 U. S. at 146.

See also: *Rusk* v. *Cort*, 369 U. S. 367 (1962). In *Rusk*, a physician who had left the United States and had refused to submit to induction into the military, applied for a passport to return to this country. The State Department denied the passport on the ground that Cort had lost his citizenship. Cort then sued the Secretary of State in the district court under the Administrative Procedure Act. The district court denied the government's motion to dismiss which argued that a statutory habeas corpus proceeding pursuant to 8 U. S. C. § 360(c) was the only method for reviewing determinations of citizenship. Upon the district court's holding of jurisdiction under the Administrative Procedure Act and its ruling in favor of the plaintiff on

the merits, the government appealed. This Court affirmed, stating:

> "[T]he Court will not hold the broadly remedial provisions of the Administrative Procedure Act are unavailable to review administrative decisions . . . in the absence of clear and convincing evidence that Congress so intended."
>
> 369 U. S. at 380.

Applying the mandates of *Abbott Laboratories* v. *Gardner* and *Rusk* v. *Cort* to the instant case, it is clear that there is no evidence of congressional intent to preclude traditional forms of judicial review by imposing a 60 day notice requirement on such remedies. Indeed, § 1857h-2(e) and its legislative history demonstrates affirmative evidence that Congress wished to preserve traditional avenues of review independent of any such restraints.

The direct conflict between the Seventh Circuit's decision below and the decisions of the this Court in *Abbott Laboratories* v. *Gardner, supra* and *Rusk* v. *Cort, supra* justify the grant of certiorari to review the judgment below.

**2. The Decision Below Conflicts with the Decisions of Other Courts of Appeals as to the Exclusivity of 42 U. S. C. § 1857h-2 as a Basis of District Court Subject Matter Jurisdiction.**

As noted above the District of Columbia Circuit has held that the citizen suit jurisdictional grant of the Clean Air Act, 42 U. S. C. § 1857h-2, and its jurisdictional counterpart in the Federal Water Pollution Control Act, 33 U. S. C. § 1365 are not the exclusive bases for district court subject matter jurisdiction and that 28 U. S. C. § 1331, 28 U. S. C. § 1361 and the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.* also conferred subject matter jurisdiction on the district court. *N. R. D. C.* v. *Train,* 510 F. 2d 692, 698-703.[16] This holding

16. See also *N. R. D. C.* v. *Train,* 519 F. 2d 287, 291 (D. C. Cir. 1975); *Oljato Chapter of Navajo Tribe* v. *Train,* 515 F. 2d 654, 664 n. 16 (D. C. Cir. 1975).



was based on an extensive analysis of the legislative history and purpose of § 304 as well as adherence to the savings clause provisions of § 304(e). The decision of the Seventh Circuit below is directly contrary to the holdings of the District of Columbia Circuit.

An additional related conflict with the District of Columbia Circuit arises from the Seventh Circuit's characterization of the Administrator's significant deterioration obligation as potentially discretionary (A27). If so, review of that obligation would not even be available under § 304—which is limited to non-discretionary duties—but would be reviewable as an abuse of discretion under the Administrative Procedure Act, 5 U. S. C. § 706. *N. R. D. C.* v. *Train,* 519 F. 2d 287, 291 (D. C. Cir. 1975).

These conflicts justify the grant of certiorari to review the judgment below.

**3. The Decision Below Conflicts with the Decision of Other Courts of Appeals as to the Appropriate Forum—District Court or Court of Appeals—to Seek Review of the Administrator's Failure to Include Statutorily Mandated Components in Promulgation of Regulations.**

The Administrator promulgated what purported to be significant deterioration regulations on December 5, 1974, 39 Fed. Reg. 42510. He claimed that this promulgation statisfied the court order in *Sierra Club* v. *Ruckelshaus, supra.* To protect their jurisdictional base, petitioners—already on appeal of the district court action in Docket No. 74-1271—filed a timely petition for review directly in the Seventh Circuit Court of Appeals under § 307—Docket No. 75-1006.

The Seventh Circuit found—and counsel for the Administrator admitted at oral argument—that the December 5, 1974 regulations did not include statutorily mandated components.[17]

17. Controls for vehicular pollutants—carbon monoxide, hydrocarbons, etc.

The Seventh Circuit held that the Administrator's failure to include the components was reviewable only in the district court and not in the court of appeals under § 307.

The Tenth Circuit has taken a directly contrary view and held that the Administrator's promulgation of regulations and the components of those regulations are only reviewable in the courts of appeals pursuant to § 307. *Anaconda* v. *Ruckelshaus*, 482 F. 2d 1301, 1304-1305 (10 Cir. 1973).

The District of Columbia Circuit has taken a different approach. It has recognized the semantic confusion which necessarily results from characterizing an inadequate or incomplete action as an action or a failure to act. Thus, where the Administrator has promulgated a regulation which in the opinion of the challengers does not go far enough, jurisdiction could rest either in the district court or the court of appeals. *N. R. D. C.* v. *E. P. A.*, 512 F. 2d 1351, 1356-1357 (D. C. Cir. 1975).

These conflicts justify the grant of certiorari to review the judgment below.

**4. The Decision Below Creates Significant Problems Regarding the Subject Matter Jurisdiction of the Federal Courts and the Administration of Judicial Review Under the Clean Air Act.**

As discussed above, a statutory scheme which was intended to give expeditious review of substantive issues under the Clean Air Act has become bogged down in broad jurisdictional inconsistencies between the circuits. If the appellate court is the appropriate forum for judicial correction of statutorily deficient regulations, then the decision below is clearly erroneous and will lead to further confusion of the review structure.

If, conversely, the district court is the appropriate forum, the Seventh Circuit's radical constriction of district court jurisdiction flies in the face of express Congressional intent, this



Court's decisions in *Abbott Laboratories* v. *Gardner*, *supra* and *Rusk* v. *Cort*, *supra* and the decisions of the District of Columbia Circuit in *N. R. D. C.* v. *Train*, 510 F. 2d 692 (D. C. Cir. 1975).

If allowed to stand, the decision below will greatly expand the ever growing litigation over the jurisdiction of our court system at great cost to effective judicial administration.

## CONCLUSION.

For the above reasons a Writ of Certiorari should be issued to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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